No. 85-499

In the Supreme Court of the United States

OCTOBER TERM, 1985

B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL.,
Petitioners.

VS.

WILLIAM A. ALLAIN, GOVERNOR, STATE OF MISSISSIPPI, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

I. Whether the United States Court of Appeals for the Fifth Circuit was correct in determining that this action was an action against the State of Mississippi and therefore the jurisdictional bar of the Eleventh Amendment to the Constitution of the United States prohibited the claims asserted by the Petitioners?

LISTING OF PARTIES

Respondents:

Petitioners have neglected to list the State of Mississippi as a party despite the fact that it has been named as such in the Complaint. (J.A. 5).

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BRIEF FOR THE RESPONDENTS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

U. S. Constitution, Amend. XI

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another state or by citizens or subjects of any foreign state."

U. S. Constitution, Article III, §§ 1 and 2

STATEMENT OF THE CASE

The petitioners filed their Complaint on June 12, 1981, naming therein as state defendants[1] "The State of Mississippi; William F. Winter, Governor, State of Mississippi;[2] Edwin Lloyd Pittman, Secretary of State and member of the Board of Education and member of the Lieu Land Commission, State of Mississippi;[3] Charles E. Holladay, Superintendent of Education and member of the Board of Education and member of the Lieu Land Commission, State of Mississippi;[4] William A. Allain, Attorney General and member of the Board of Education and member of the Lieu Land Commission, State of Mississippi;[5] A. Michael Espy, Assistant Secretary of State, State of Mississippi".[6] Each of the individual state defendants and their "predecessors in office" are named in their official capacity only. (J.A. 2, paragraph 3).

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1. All state defendants are jointly referred to herein as "state defendants" and the state officials named will be referred to as "individual state defendants".

2. Now succeeded in office by William A. Allain.

3. Now succeeded in office by Richard Molpus. As noted in footnote 4 below, the Secretary of State is no longer a member of the State Board of Education.

4. The elective position of Superintendent of Education was abolished, effective July 1, 1984, pursuant to amended § 206 of the Constitution of the State of Mississippi, approved by referendum on November 1, 1983 and § 37-3-39(2)(a) of the Mississippi Code of 1972, as amended. The Constitutional amendment further removed the Superintendent of Education, the Attorney General and the Secretary of State as members of the State Board of Education. The superintendent is not a member of the Lieu Land Commission. *See*, § 29-3-17 of the Mississippi Code of 1972, as amended.

5. Now succeeded in office by Edwin Lloyd Pittman. As noted above, the Attorney General of the State of Mississippi is no longer a member of the State Board of Education.

6. No longer holds this position nor was he ever a member of the Board of Education or the Lieu Land Commission.

The petitioners are the county superintendent and boards of education in school districts located in all or part of 23 counties and school children and parents in those districts (J.A. 4) who allege that the state defendants and their predecessors in office violated the petitioners' due process and equal protection rights under the Fourteenth Amendment to the United States Constitution. The crux of the allegations is that when the Chickasaw Indian Tribe ceded its lands in Mississippi under the Treaty of Pontitock Creek[7] in 1832, the United States failed to reserve the sixteenth sections located therein from the sale of all Chickasaw lands by the United States at public auction in order that the Chickasaw nation could "realize the greatest possible sum" therefrom.[8] (J.A. 11, paragraphs 28 and 29). Subsequently, pursuant to Acts of Congress on July 4, 1836 and June 13, 1842,[9] authority was granted for the Governor of the State of Mississippi to select "lieu land" outside the counties and this was accomplished. (J.A. 61-62). These lands were subsequently leased for ninety-nine (99) years in 1848 and were subsequently sold[10] as ratified by the Act of Congress of May 12, 1852.[11] (J.A. 63). The funds were then invested in railroad companies to secure the construction of railroads throughout the state. (J.A. 90-92, paragraph 10). Due to the destruction of the railroads during the Civil War, the securities received for such investments

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7. For simplicity, other references to this treaty will use the modern spelling of "Pontotoc".

8. Article I, Treaty of Pontotoc.

9. 5 Stat. 116, Ch. CCCLV; 5 Stat. 490, Ch. XL.

10. The State Representatives and Senators of the Chickasaw Cession counties voted in favor of these acts. Miss. House Journal of 1848, pp. 388, 537, Miss. Senate Journal of 1848, p. 711.

11. 10 Stat. 6, Ch. XXXV.

were rendered worthless. (Petitioners' brief at page 9).[12] Despite this, the State has continued to pay interest to the Chickasaw Cession school districts on the corpus of the fund which was $1,036,515.00. Section 212 of the Constitution of 1890 of the State of Mississippi established the Chickasaw Cession Lieu Land Fund and sets the interest rate thereon at six percent (6%). (J.A. 65).

The petitioners' Complaint seeks ("through legislative appropriation or otherwise") the following specific relief from the state defendants:

> a. "conveyance to them of . . . real and/or personal properties (including money) of equivalent income producing value" [as the original Sixteenth Sections in Chickasaw Cession];
>
> b. "conveyance to them of . . . other real and/or personal properties (including money) of equivalent income producing value" [as the original Chickasaw Cession Lieu Lands];
>
> c. "That . . . the defendants . . . be enjoined and directed to take such actions as are necessary and appropriate to set aside and make available for the use and benefit of the plaintiffs . . . a fund or funds of such value and in such amount as may reasonably be necessary to:
>
> > 1. Provide annual income to the respective Chickasaw Cession School Districts hereafter at a level equivalent to the level of income which each could reasonably expect to enjoy if the District

12. The last Act in regard to the sale of the Chickasaw Cession lieu lands and investment of the funds derived therefrom was in 1859, prior to the adoption of the Fourteenth Amendment to the Constitution of the United States in 1868.

> still owned in trust its original Chickasaw Cession Sixteenth Section Lands or its Original Chickasaw Cession Lieu Lands, whichever are the more valuable, and said lands were given over to their highest and best income producing use, *and* in addition,
>
> 2. To compensate and make whole petitioners and respondent class[13] for all income their respective school districts could have received from 1832 to the present if they had been receiving the income from their respective Chickasaw Cession Sixteenth Section Lands, or, in the alternative, their respective Chickasaw Cession Lieu Lands, if such lands had been subjected to such prudent use and reasonable management . . . as would have been required of trustees holding properties in trust and as would have produced maximum levels of annual income, *and*
>
> 3. To compensate petitioners and the plaintiff class for the interest that would have been earned on the funds described in (b)[2] above had said funds been received annually and immediately thereafter invested at the best rate of interest then available, and further, had said funds remained so invested continuously until this time with interest compounded annually."
>
> d. "Acquire, set aside and make available for the use and benefit of the petitioners and the petitioner class . . . appropriate new lieu lands (which may include offshore oil, gas and other mineral rights and interests owned by . . . the State of Mississippi)";

13. Petitioner Class certification was held in abeyance until a decision on motions to dismiss.

e. "Take any and all other steps or actions as may be reasonably necessary or appropriate to:

> 1. Make available to petitioners and the petitioner class properties of value equivalent to the current fair market value of the properties [allegedly] unlawfully sold . . . or
>
> 2. Make available to petitioners and the petitioner class in perpetuity income at such level as may be equitable and just, or
>
> 3. Eliminate and compensate and for the future guarantee and protect petitioners and the petitioner class against . . . denials and deprivations of their rights to due process of law and to the equal protection of the laws";

f. "Develop, prepare and file with the Court . . . a plan for the orderly implementation of the declaratory and injunctive relief otherwise granted." (J.A. 23-24 and 26-29).

The Complaint makes no contention or allegation that any current statute, law or constitutional provision of the State of Mississippi is unconstitutional, nor do petitioners seek to have any so declared. All relief sought is based on acts that occurred prior to 1859. (J.A. 26-30). The petitioners make no assertion in the Complaint or their brief as to the provisions of the Constitution which were in effect at the time of the lease and sale of the lieu lands in question. There were no restrictions on the disposal of 16th section as lieu lands.[14]

14. The only provision regarding education in the Constitution at the time of the acts complained of was Article VII, Section 14 of the Constitution of 1832 which provided: "Religion, morality and knowledge, being necessary to good government, the preservation of liberty and the happiness of man, schools and the means of education shall forever be encouraged in this state."

The state defendants filed their motion to dismiss on October 2, 1981 and set forth various grounds therefor, including failure to state a claim, the Eleventh Amendment jurisdictional bar, applicable statutes of limitation, lack of standing to bring the action and laches. (J.A. 31-33). Each of these positions, together with other grounds, were briefed, argued and presented to the District Court.

The District Court, on January 20, 1984, dismissed the Complaint against all state defendants based on the Eleventh Amendment jurisdictional bar and the applicable statutes of limitation. (P.A. 36-39). The United States Court of Appeals for the Fifth Circuit affirmed the District Court decision on April 5, 1985 and denied re-hearing *en banc* on May 21, 1985. (P.A. 1-35).

STATEMENT OF THE FACTS

Although respondents do not challenge the Statement of the Facts as presented by petitioners, they do find that "certain statements" contained therein are not complete. A factor which should be included in the Statement of Facts is that every school district in the State of Mississippi receives the exact same appropriation based on teacher units under the Minimum Program of Education Grant. (§ 37-19-1, *et seq.* of the Mississippi Code of 1972, as amended).[15] No school district in other sections of the

15. This program is based on "teacher units" which is computed on average daily attendance figures. It funds teachers' salaries, superintendent and principal salaries, and separate services such as salaries for art and music teachers, librarians, and guidance counselors, as well as providing for nurses and lunch room personnel, together with funds for textbooks, audio visual equipment, building improvements and costs of transportation. *cf. San Antonio School District v. Rodriguez*, 411 U.S. 1, 44-45, 47, 36 L.Ed.2d 16, 50, 51, 93 S.Ct. 1278 (1973).

State of Mississippi receives any appropriation from the Mississippi Legislature that the Chickasaw Cession counties do not receive.

All funds derived from 16th section leases are derived from the actions of the respective local school districts and not from the state, pursuant to § 29-3-1, *et seq.* of the Miss. Code of 1972, as amended. (J.A. 71-79). The state does not lease the lands nor does it receive the funds paid therefor and re-distribute them in some manner. (P.A. 28-29). Of course the funds derived by the non-Chickasaw Cession counties vary widely depending upon the location of the 16th section leases, mineral income and the skills of the local administrators. (P.A. 29). For instance, Neshoba County receives $3.03 per student while the neighboring county of Kemper received $118.65 and Lauderdale County, immediately south of Kemper, receives $5.80. On a per acreage basis, Neshoba receives $1.13; Kemper, $16.25; and Lauderdale, $6.20. Special Report on Chickasaw Cession School Districts. (J.A. 45 and 46). Therefore, respondents would adopt the facts as found by the 5th Circuit as set out in Petition for Certiorari Appendix at Pages A-3 through A-35.

SUMMARY OF ARGUMENT

The lower court was eminently correct in affirming the dismissal of the Complaint by the District Court in this matter on the basis of the Eleventh Amendment jurisdictional bar as provided by the Constitution of the United States.

Recent case authority holds that, at most, petitioners are only entitled to the relief requested in the Complaint. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723, 73 L.Ed.2d 1090, 1097, fn. 7, 102 S.Ct. 331 (1982).

The actions complained of which took place over one hundred thirty (130) years ago were legal and proper, including the investment of the funds derived from the sale of lands. *Cooper v. Roberts*, 18 How. 173, 15 L.Ed. 338 (1856); *Alabama v. Schmidt*, 232 U.S. 168, 173-174, 58 L.Ed. 555, 558, 34 S.Ct. 301 (1913), and *State of Louisiana v. William T. Joyce Co., et al.*, 261 F. 128, 131 (5th Cir. 1919).

The Eleventh Amendment to the Constitution of the United States provides a constitutional jurisdictional bar to the petitioners bringing this action for any type of relief, whether prospective or retroactive, even though the petitioners named public officials in their official capacity, because this is, in effect, a suit against the State of Mississippi which it has not consented to. *Edelman v. Jordan*, 415 U.S. 651, 662, 663, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974); *Florida Department of Health v. Florida Nursing Home Association*, 450 U.S. 147, 67 L.Ed.2d 132, 101 S.Ct. 1032 (1981); *Alabama v. Pugh*, 438 U.S. 781, 57 L.Ed.2d 1114, 98 S.Ct. 3057 (1978); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 89 L.Ed. 389 (1945); *Louisiana v. Jumel*, 107 U.S. 711, 720-723, 727-728 (1892); *Corey v. White*, 457 U.S. 85, 91, 71 L.Ed.2d 694, 102 S.Ct. 2325 (1982); *Pennhurst v. Halderman*, 465 U.S. 89, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984); *Atascadero State Hospital v. Scanlon*, 437 U.S. ....., 87 L.Ed.2d 171, 105 S.Ct. ..... (1985); *Green v. Mansour*, 474 U.S. ....., 88 L.Ed.2d 371, 106 S.Ct. ..... (1985); and *Gay Student Services v. Texas A & M University*, 737 F.2d 1317 (5th Cir. 1984). The State of Mississippi and its agencies cannot waive their immunity without statutory authorization. *Horne v. State Building Commission*, 233 Miss. 810, 103 So.2d 373 (1958). The State of Mississippi has specifically preserved its immunity from suit in Federal Court, Section 11-46-5(4) of the Mississippi Code of 1972, as amended (1985).

There has been no absolute denial of a public education to any petitioner and mere differences between school districts in the amount of funds received is not a constitutional violation since education is not one of the rights afforded explicit protection under the Constitution nor is it implicitly protected thereunder. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 36 L.Ed.2d 16, 93 S.Ct. 1278 (1973). Further, rather than diminish education opportunity, the legislature, with the creation of the Chickasaw School Fund, has increased funds available for the respective districts. 1985 Miss. Laws 27, Ch. XXIII. (J.A. 97-98). Further, Section 212 of the Mississippi Constitution of 1890 provides an additional source of funds appropriated by the state which non-Chickasaw Cession districts do not receive.

Alternatively, although not specifically addressed by the lower court, the petitioners have not alleged a case or controversy pursuant to Article III of the United States Constitution. *See, Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 70 L.Ed.2d 700, 102 S.Ct. 752 (1982).

ARGUMENT

I.

Introduction

On October 20, 1832, the Treaty of Pontotoc was entered into between the Chickasaw Nation and the United States of America which ceded "all of the land they [the Chickasaw Nation] own on the east side of the Mississippi . . ."[16] under the terms that *all of the land,* except

16. Article I, Treaty of Pontotoc.

that specifically reserved to the members of the tribe named, be sold at public auction in order that the Chickasaw Nation "realize the greatest possible sum for their lands which can be obtained."[17] Nowhere in the treaty is any provision made for the reservation of any of the ceded lands for any purpose except for members of the Nation who did not desire to move.[18]

This cessation together with the cessation by the State of Georgia of the Mississippi Territory[19] completed the transfer of the lands which have been referred to in the Complaint as the "Chickasaw Cession Lands". Tersely put, the Chickasaw Nation was astute enough to require *all* of its lands to be sold with the Nation receiving the proceeds.[20] Despite any contentions to the contrary by petitioners, a treaty is the Supreme Law of the Land.[21] Despite any protestations to the contrary, any ordinances and enactments in conflict with this treaty must fall. Therefore, the march of chronological events proceeds to the establishment and procurement of "Chickasaw Lieu Lands".

Mississippi had been admitted to the Union in 1817. On July 4, 1836, less than four years after the execution of the Treaty of Pontotoc, the Congress of the United States provided that the State of Mississippi could select acres in "lieu" of the 16th Sections not permitted to be

17. Article VIII, Treaty of Pontotoc.

18. Article IV, Treaty of Pontotoc.

19. April 14, 1802.

20. This was done despite the fact that Colonel John Coffee who negotiated on behalf of the United States had negotiated other treaties in Mississippi with the Choctaw Indian Tribe that excepted the 16th section from sale. Treaty of Dancing Rabbit Creek, 1830.

21. Article VI, Section 2, U. S. Constitution.

reserved by the Chickasaw Nation. This was accomplished. However, only the area of the Mississippi Delta remained for most selections and at that time it was swampy and subject to flooding by the Mississippi River as well as other rivers crossing same as well as being disease prone. *McLemore,* a History of Mississippi, Vol. II at 183 (1973).

In 1848 the State of Mississippi authorized the sale or lease of these lieu lands by legislative enactment[22] which included affirmative votes by the Senators and Representatives of certain of the counties then in existence and located in the Chickasaw Cession.[23] This land was subsequently conveyed according to said statutes as the State was authorized to do once it had received the lands, since there was no prohibition contained in the grant of the lieu lands. The monies received therefrom were placed in investments for the respective school districts. The contention of petitioners that the state was not authorized to dispose of school lands is totally without foundation. The admission of the State of Mississippi to the Union in 1817 vested the title to all Sixteenth Section and lieu lands in the state from the United States after the surveys were complete. The Chickasaw Lieu Lands Act, 5 Stat. 116, Ch. CCCLV (1836), provides in pertinent part ". . . and said lands thus selected, shall be holden by the same tenure, and upon the same terms and conditions, in all respects as the said state now had as to lands heretofore reserved for the use of

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22. 1848 Miss. Laws 62, Ch. III. (J.A. 82-85). The price of $6.00 per acre seems reasonable for the period in question since the land was swampy and subject to flooding with few roads or settlements.

23. House Journal, 1848, p. 800, Senate Journal, 1848, p. 711.

schools in said state." (J.A. 61). Of course, the 1817 Land Sales Act for Mississippi, 3 Stat. 375, Ch. LXII, in regard to Sixteenth Section lands only provides that Section No. 16 in each township "shall be reserved for the support of the schools therein." (J.A. 60). "The trusts created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which the power of the State is plenary and exclusive". *Cooper v. Roberts,* 18 How. 173, 15 L.Ed. 338 (1856). "[T]he gift to the state is absolute and there is a sacred obligation imposed on public faith, but that obligation is honorary . . . *and even in honor would not be broken by a sale and substitution of a fund . . . a course that we do not believe to be uncommon among the States.*" (Emphasis supplied). *Alabama v. Schmidt,* 232 U.S. 168, 173-174, 58 L.Ed. 555, 558, 34 S.Ct. 301 (1913). The state had and has authority to subject this land in its hands to the ordinary incidents of other titles in the state. *Alabama v. Schmidt, supra.* Therefore, this contention, along with the first concerning the non-reservation of the Sixteenth Section Land in the original treaty are laid to rest.

The State of Mississippi did not even have to seek to ratify the sale of the lieu lands by Congress. (J.A. 63). Suffice it to say that the law is complete on the subject that once the "gift" of the land is made to the state and the survey is complete, the United States no longer has any control over the leasing or disposition thereof. *United States v. Morrison,* 240 U.S. 192, 60 L.Ed. 599, ... S.Ct. ..... (1916). Therefore, if Congress cannot control what it doesn't have, any attempt by Congress to place conditions on the disposition of the land after the gift is complete is totally without any force and effect. There were no words in the original "gift" which could be considered

as conditional and, therefore, it was not conditioned or restrained. There was no State Constitutional provision restraining the alienation of the "Lieu Land" when the lands were conveyed by the state.[24] Petitioners do not challenge the constitutionality of this section or any other current section or law. Therefore, the validity of such disposition is not dependent upon a compliance with a qualified permission to sell enacted by Congress after the lands had ceased to belong to the United States. *State of Louisiana v. William T. Joyce Co., et al.*, 261 F. 128, 131 (5th Cir. 1919), citing *Cooper v. Roberts, supra, Alabama v. Schmidt, supra.*

In *Pennhurst State School v. Halderman,* 451 U.S. 1, 67 L.Ed.2d 694, 101 S.Ct. 1531 (1981), this Court held that Congress must, unambiguously, fix the terms on how a State shall disburse federal monies before a State can be required to expend or distribute federal monies in a specific manner.

The Court observed:

> ". . . [O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. . . . [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the State agrees to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under

24. See Footnote 14, *supra.* It is of particular moment that Article 8, Section 211 of the Mississippi Constitution of 1890, even today in regard to lieu lands provides in pertinent part:

> . . . provided, however, that land granted in lieu of sixteenth section land in this state and situated outside of the county holding or owning same, may be sold and the proceeds from such sale may be invested in a manner to be prescribed by the Legislature; . . .

> the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract. [Citations omitted]. There can be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. [Citations omitted]. By insisting that Congress speaks with a clear voice, we enable the states to exercise their choice knowingly. . . ." 67 L.Ed.2d at 707.

Of course the same logic and reasoning should apply as to 16th section or lieu lands since the State of Mississippi had no basis to believe that the sale of the lieu lands and the establishment of a fund with the proceeds thereof for the school districts involved would attempt to be judged by standards other than those in effect at the time. Retroactive changes, as petitioners seek, in the terms of the grant would deny the States fixed, predictable standards in many fields for determining if their actions are proper. *cf. Bennett v. New Jersey,* 470 U.S. ....., 84 L.Ed.2d 572, 580, 106 S.Ct. ..... (1985).

The State has the power to sell school lands without the consent of Congress once the lands are granted to the State unless restrictions are placed thereon by Congress at the time of the grant to the state and before the survey is completed.[25] Such was not done in the Chickasaw Lieu Land grants nor any other grant to the State of Mississippi.

25. *Andrus v. Utah,* 446 U.S. 500, 64 L.Ed.2d 458, 100 S.Ct. 1803 (1980); *Lassen v. Arizona* 358 U.S. 458, 17 L.Ed.2d 515, 87 S.Ct. 584 (1967); *U.S. v. Morrison,* 240 U.S. 192, 60 L.Ed. 599, 36 S.Ct. 326 (1916).

It is undisputed that upon the sale of the lands in question, the funds derived therefrom were placed in trust as authorized by 1848 Miss. Laws 62, Ch. III. (J.A. 83-84, Sec. 5). The state was and is the trustee as no officer of the state was or has been named to act as trustee or administrator of the trust. Subsequently, the Mississippi Legislature, by the Acts of 1856 (J.A. 87 at 91-92), authorized an amount derived from the sale of these lands to be invested in certain railroads with first mortgage bonds taken as security therefor to be equal in value to the loan to each railroad, earning eight percent (8%) annually, secured by *all* property and effects of the company. In addition, stock certificates of each railroad equal to four (4) times the amount of the loan, all payable to the State of Mississippi, were taken as security. (J.A. 91-92). These loans were repaid in part prior to the War between the States and during said travail, additional payments were made in specie or state treasury notes. However, these later payments were declared not to be valid and the State subsequently sought to obtain payment in hard currency and prevail. *MCRR v. The State of Miss.*, 46 Miss. 157 (1871); *N.O.S.&L. Chicago R.R. v. The State*, 52 Miss. 877 (1876).

Of course, the trustee cannot be held responsible for the loss of the investment when the loss was occasioned by acts beyond his control (such as a war and the destruction of the railroads' "property and effects") and which did not result from a breach of trust. III Scott on Trusts § 204 (3rd Edition (1967)). III Scott, *supra* at § 227 provides:

> "The conduct of the trustee in making an investment is to be judged at the time when he made it and not at some later time. It would obviously be unfair to the trustee to hold him liable for a loss which he has no reason to foresee at the time when he made the investment, although after the loss occurred it is possible to see that the causes of the loss were operating at the time when the investment was made. The facts should be looked at as they existed at the time of their occurrence, not aided by those which subsequently took place and a wisdom developed after an event, and to have it and its consequences as a source, is not a fair standard to apply."

Petitioners have, therefore, attempted to raise a smoke screen to hide the only issue in this cause. To summarize, the State of Mississippi received the lieu lands without restrictions, disposed of said land in conformity with the law (then and now), invested the funds derived therefrom in prudent secured investments, but due to a great war, the funds loaned and the security for these investments were destroyed, yet the State has continued to pay the interest on the funds to the Chickasaw Cession school districts.

Therefore, what we have is a lawsuit that seeks to have the Court order (1) an increase in the amount upon which interest is paid, and/or (2) increase the interest paid on same. Each requirement would destroy the very purposes for which the Eleventh Amendment was enacted.

II.

There Are No True Defendants Except the State of Mississippi

It is well settled that "the State of Mississippi" and its agencies cannot be subjected to the jurisdiction of the federal courts. However, there are state officials who are defendants who are named in their official capacities as

members of the Lieu Land Commission of the State of Mississippi or the State Board of Education or both.[26]

Initially, it should be determined why they were named defendants since they are not the successors to the individuals who allegedly took the acts complained of. Each act complained of was mandated by state statute prior to the adoption of the 14th Amendment and the payment of funds is authorized by the current Constitution of the state. The person who was directed to loan the money at the time to the railroads and take the security therefor was the state auditor of public accounts. (J.A. 91). In fact, the Lieu Lands Commission was not even created until 1942[27] and its duties under § 29-3-15, *et seq.* of the Miss Code of 1972 (J.A. 72), as amended, are limited to "sell all lands granted in lieu of the 16th section lands which are located outside the county owning said land situated in the State of Mississippi." Conversely, the State Board of Education has no duties or obligations and never has had regarding 16th section or lieu lands.[28] Further, the Superintendent of Education has no duties or obligations regarding 16th section or lieu lands and never has.[29] In regard to funds

26. Except for the Defendant Harvey, about whom it is unclear why she is named as a defendant since she is not a member of either the Lieu Land Commission, or the Board of Education, nor has her predecessor ever been

27. Chapter 162, General Laws of 1942.

28. Section 203 of the Mississippi Constitution now provides that as of July 1, 1984, the State Board is composed of nine lay members appointed from various sections of the state. Pursuant to § 37-1-1, *et seq.* of the Miss. Code of 1972, as annotated and amended, no duties are mentioned as to either 16th section or lieu lands.

29. The new State Superintendent of Education, effective July 1, 1984, is appointed by the Board of Education and, pursuant to § 37-3-11, has no duties or obligations regarding 16th section or lieu lands and is not a member of the Lieu Land Commission.

derived from the sale of sixteenth section lands or lieu lands, the state can only act through the Legislature. *Daniel v. Sones*, 147 So.2d 626, 629 (Miss. 1962); *City of Corinth v. Robertson*, 87 So. 464 (Miss. 1921). The only thing the Governor of the State of Mississippi has had to do with this matter is that Congress allowed him to select the lands granted in lieu of those the federal government failed to reserve under the treaty. Therefore, petitioners have initially sued the wrong public officials or at the least, ones who can in no way grant the relief requested should the Court so order. It should also be pointed out that they are not trustees under Section 212 of the Mississippi Constitution and the trust established thereby is administered by the legislature of the State of Mississippi which is the only body that can appropriate and authorize the expenditure of the funds therefor. *Daniel* and *City of Corinth, supra.*

III.

A.

The Eleventh Amendment to the Constitution Is a Jurisdictional Bar to Petitioners' Complaint

The issue before the Court is whether the lower courts were correct in determining that the claims of the petitioners were subject to the jurisdictional bar of the Eleventh Amendment to the Constitution of the United States. Respondents assert that the lower courts were eminently correct.

The Eleventh Amendment to the Constitution of the United States reads as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity

> commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.

Although this amendment on its face does not bar suits against a state by its own citizens, this Court has consistently held that such suits are barred unless the particular state has consented to suit. *See, Hans v. Louisiana,* 134 U.S. 1, 33 L.Ed. 842, 10 S.Ct. 504 (1890); *Edelman v. Jordan,* 415 U.S. 651, 662, 663, 39 L.Ed.2d 662, 672, 94 S.Ct. 1347 (1974); *Florida v. Treasure Salvors, Inc.,* 458 U.S. 670, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (1982). It is clear that in the absence of consent, a suit in which a state or one of its agencies or department is the defendant is jurisdictionally barred by the Eleventh Amendment. In the State of Mississippi, statutory waiver of sovereign immunity is necessary. *Horne v. State Bldg. Comm.,* 233 Miss. 810, 103 So.2d 373 (1958). As this Court has also found in *Florida Department of Health v. Florida Nursing Home Association,* 450 U.S. 147, 67 L.Ed.2d 132, 101 S.Ct. 1032 (1981) and *Alabama v. Pugh,* 438 U.S. 781, 57 L.Ed.2d 1114, 98 S.Ct. 3057 (1978), when the suit is against the state and its agencies this jurisdictional bar applies regardless of the relief sought. *See also, Missouri v. Fisk,* 290 U.S. 18, 27, 78 L.Ed. 145, 54 S.Ct. 18 (1933).

In the instant matter, as stated *supra,* the "State Defendants" named in the Complaint are now as follows: "The State of Mississippi; William A. Allain, Governor, State of Mississippi; Richard Molpus, Secretary of State and member of the Board of Education and member of the Lieu Land Commission, State of Mississippi; Richard A. Boyd, Superintendent of Education and member of the Board of Education and member of the Lieu Land Commission, State of Mississippi; Edwin Lloyd Pittman, Attorney General and member of the Board of Education and member of the Lieu Land Commission, State of Mississippi; Constance Slaughter Harvey, Assistant Secretary of State, State of Mississippi." Each of the individually named defendants are named in their official capacity only. (J.A. 5-6).

There is not room for doubt that "the State of Mississippi", "the Board of Education" and "the Lieu Land Commission" cannot be sued in the federal courts pursuant to the Eleventh Amendment jurisdictional bar. *Alabama v. Pugh, supra.* The jurisdictional bar applies likewise to the named defendants as the allegations in this cause are couched. The Eleventh Amendment bars a suit against state officials when "the state is the real substantial party in interest". *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 89 L.Ed. 389 (1945); *In re Ayers,* 123 U.S. 443, 487-489 (1887); *Louisiana v. Jumel,* 107 U.S. 711, 720-723, 727-728 (1892).

> Thus "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii v. Gordon,* 373 U.S. 57, 58, 10 L.Ed.2d 191, 83 S.Ct. 1052 (1963) (per curiam).[11] And as when the State itself is named as the defendant, a suit against state officials that is, in fact, a suit against a state is barred *regardless of whether it seeks damages or injuncture relief. See, Corey v. White,* 457 U.S. 85, 91, 72 L.Ed.2d 694, 102 S.Ct. 2325 (1982) (Emphasis supplied).

Pennhurst v. Halderman, 465 U.S. 89, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984).

In *Pennhurst,* the Court went further in footnote 11, citing *Dugan v. Rank,* 372 U.S. 609, 10 L.Ed.2d 15, 83 S.Ct. 999 (1963), to say:

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain or interfere with the public administration,' or if the effect of the judgment would be, 'to restrain the Government from acting or to compel it to act.' "

It is beyond dispute that the relief sought by Petitioners, although now alleged to be only a suit for a mandatory injunction and not for retroactive relief (petitioners' brief at 37), would "expend itself on the public treasury or domain" of the State of Mississippi and "interefere with the public administration" of the state and "restrain the [State of Mississippi] from acting" or, in the alternative, "compel it to act", and cause property to be disposed of belonging to the State of Mississippi. (J.A. 26-30). Even petitioners' brief at 37 states that they seek an injunction to have the respondents, "comply in the future with the trust obligations assumed by virtue of the school lands trust by *providing Chickasaw Cession schools with trust income* commensurate with the obligations imposed by the trust." (Emphasis supplied). This is the exact thing *Edelman* and *Pennhurst, supra,* preclude.

Petitioners misconstrue the "obligations" imposed by the "trust". The only conditions imposed by the grant of the lieu lands (or 16th sections) to the State of Mississippi is ". . . for the support of the schools therein, . . ." The grants do not state any other restrictions or that these lands would be used for the total funding or minimally adequate funding of the schools in the township, unlike the grants to Arizona which contained further restrictions. *See, Lassen, supra,* and *Alamo Land and Cattle Co. v. Arizona,* 424 U.S. 295, 47 L.Ed.2d 1, 96 S.Ct. 910 (1976). The grant to Arizona was made under restrictions which became steadily more rigid and specific, but even then the State of Arizona can divert the lands to alternate public uses and compensate the trust for the market value of the interest taken. *Lassen, supra,* at 467-468.

As to the Boards and Commissions on which the individually named defendants serve, although not specifically named as defendants, they do not control the 16th section land leases or lieu lands leases. Nevertheless, this Court in *Alabama v. Pugh,* 438 U.S. 781, 782, 57 L.Ed.2d 1114, 1116, 98 S.Ct. 3057 (1978), put it very plainly:

> Among the claims raised here by petitioners is that the issuance of a mandatory injunction against the State of Alabama and the Alabama Board of Corrections is unconstitutional because the Eleventh Amendment prohibits Federal Courts from entertaining suits by private parties against states and their agencies . . . . There can be no doubt, . . . that suit against the state and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit.

Of course, the Lieu Land Commission and the Board of Education are agencies of the State of Mississippi in the same manner that the Department of Corrections is an agency of the State of Alabama. The Complaint filed in the instant cause does not even allege that the immunity of the State of Mississippi, the Lieu Land Commission and/or the Board of Education has been waived or that any consent has been given to this suit. Further, the State of Mississippi has never consented to waive either its sovereign or Eleventh Amendment immunity. See § 11-46-1 of the Mississippi Code of 1972, as amended (1985), which re-establishes sovereign immunity through July 1, 1986

and waives the immunity only for claims accruing after that date. Specifically, § 11-46-5(4) of this Act provides that "nothing in this act shall be construed to waive the immunity of the state from suit in federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States". This specific language was cited with approval in *Pennhurst, supra,* at footnote 12.

Further, the Mississippi Supreme Court has never abrogated sovereign immunity and stated in *Pruett v. City of Rosedale,* 421 So.2d 1046 (Miss. 1983).

> We do not abolish by this opinion the historical and well-recognized principle of immunity granted to all legislative, judicial and executive bodies and those public officers who are visited with discretionary authority, which principle of immurity rests upon an entirely different basis and is left intact by this decision.

B.

The Eleventh Amendment to the Constitution Is a Jurisdictional Bar to the Petitioners' Claims Against State Officials in Their Official Capacity

As to any contention by the appellants that they have asserted a claim for prospective relief since they sued the state officials in their official capacities and, therefore, the Eleventh Amendment jurisdictional bar does not apply, *Pennhurst, supra,* also lays this issue to rest.

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty

> than when a federal court instructs state officials on how to conform their conduct to state law.

Pennhurst, supra, at 79 L.Ed.2d 87.

Any claim by the petitioners that they are seeking prospective relief only simply will not survive close scrutiny of the Complaint. What they are seeking are "dollars or dirt" and the only thing "prospective" about the relief sought is that it would have to be paid in the future from the public treasury or domain of the State of Mississippi. The *Pennhurst* decision recognizes this in footnote 25, found on page 87:

> To say that injunctive relief against state officials acting in their official capacity does not run against the state is to resort to the fictions that characterize the dissent's theories. Unlike the English sovereign, perhaps, an American State can act only through its officials. It is true that the court in *Edelman* recognized that retroactive relief often, or at least sometimes, has a greater impact on the state treasury than does injunctive relief, *see* 415 U.S. 666, N. 11, but there was no suggestion damages alone were thought to run against the state while injunctive relief did not.

Pennhurst, supra, at 79 L.Ed.2d 87.

Of course, *Edelman v. Jordan,* 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974) provides:

> It is well established that even though a state is not named as a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1945), the Court said:

> [W]hen the action is in essence one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are named defendants.

Id., at 464, 89 L.Ed. 389.

The *Edelman* Court did not stop here, however, but went even further to find that:

> Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment *Great Northern Life Insurance Co. v. Read, supra; Kennecott Copper Corp. v. State Tax Commission,* 327 U.S. 573, 90 L.Ed. 862, 66 S.Ct. 745 (1946).

What could be more on point? In the instant matter, the petitioners seek "by legislative appropriation or otherwise" (J.A. 23, paragraph 62), the establishment of a fund for the use and benefit of the petitioners having such amount of money or value as reasonably necessary:

> a. to provide annual income to the respective Chickasaw Cession School Districts hereafter at a level equivalent to the level of income which each could reasonably expect to enjoy, if said District still owned in trust its original Chickasaw Cession Sixteenth Section Lands, or its original Chickasaw Cession Lieu Lands, whichever are more valuable, and said lands were given over to their highest and best income producing use, and, in addition,
>
> b. to compensate and make whole Plaintiffs and the Plaintiff Class for all income their respective school

> districts would have received from 1832 until the present if they had been receiving the income from their respective Chickasaw Cession Sixteenth Section Lands, or in the alternative, their respective Chickasaw Cession Lieu Lands, if such lands had been subjected to such prudent use and reasonable management (which would have included placing said lands in their highest and best income producing use) as would have been required of trustees holding properties in trust and as would have produced maximum levels of annual income, and
>
> c. to compensate Plaintiffs and the Plaintiff class for the interest that would have been earned on the funds computed as described in (b) above had said funds been received annually and immediately thereafter invested at the best rate of interest then available, and further, had said fund remained so invested continuously until this time, with interest compounded annually;
>
> (2) acquire, set aside and make available for the use and benefit of Plaintiffs and the Plaintiff Class subject to the terms and provisions of the aforesaid perpetual and irrevocable trust appropriate new lieu lands (which may include offshore oil, gas and other mineral rights and interests owned by the United States and/or by the State of Mississippi);
>
> (3) take any and all other steps or actions as may be reasonably necessary or appropriate to
>
> (a) make available to Plaintiffs and the Plaintiff Class properties of value equivalent to the current fair market value of the properties unlawfully sold as aforesaid, or

(b) make available to Plaintiffs and the Plaintiff class in perpetuity income at such level as may be equitable and just, or

(c) eliminate and compensate and for the future guarantee and protect Plaintiffs and the Plaintiff class against the above described denials and deprivation of their rights to due process of law and to the equal protection of the laws;

(4) develop, prepare and file with the Court, and subject to confirmation and approval by the Court, a plan for the orderly implementation of the declaratory and injunctive relief otherwise granted; . . .

If this is not a prayer for an impingement on the State treasury, then what would be? As an aside, it should be pointed out as shown in the Complaint (J.A. 11, paragraph 28) that the petitioners admit that the sixteenth section lands were never reserved by the United States in the Treaty of Pontotoc Creek and all lands conveyed to the United States were, in accordance with the treaty, sold by it. Therefore, there were never any sixteenth sections in the treaty area that were conveyed to the State of Mississippi. But, back again to the point; the petitioners seek retroactive damages, and it can be classified as nothing else, from the State of Mississippi. The only ongoing act complained of is that the legislature of this state pays to the respective school districts six percent (6%) interest on the trust and not more. Certainly, the named individual defendants cannot provide the relief requested and as the petitioners admit, it would have to be by legislative act. Therefore, although the Complaint is drawn in artful terms as to the individual state defendants, it still cannot, upon close examination, evade or circumvent the Eleventh Amendment jurisdictional bar.

See, Gay Student Services v. Texas A & M University, 737 F.2d 1317 (5th Cir. 1984).

A close examination of *Edelman, Pennhurst, Atascadero* and *Green, supra,* reveals that in each case individual defendants were named. In *Edelman* it was obvious that the funds would not be paid from petitioner Edelman's pocket. *Edelman,* at 664. Certainly the same would be true here particularly since none of the individual state defendants has anything to do with the Chickasaw funds nor acts in any way as trustee thereof. This has all been reserved to the Mississippi Legislature. The Legislature is the trustee and not any individual state official. Here the petitioners are not asking for "prospective relief" which *may* have an ancillary effect on the treasury of the state. They are asking for an injunction that *will* have a direct effect on the state treasury and it certainly will not vindicate the supremacy of federal law. Here as in *Edelman,* any such injunction will "require payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination but as a form of compensation" to those who attend and/or manage the public schools in the Chickasaw Cession. It will be measured in terms of a monetary loss to the State of Mississippi resulting from an alleged past breach of an alleged legal duty on the part of the named individual state officials which they, nor their predecessor, have not had any duty in respect thereto. Here they are named only because of the positions they occupy; not because they or their predecessors acted or refused to act. They cannot provide the relief requested even if enjoined to do so.

Under the facts in the instant matter, *Milliken v. Bradley,* 433 U.S. 267, 53 L.Ed.2d 745, 97 S.Ct. 2749 (1977) so heavily relied upon by petitioners is easily distinguished. As the Court said in *Milliken,* in the opening paragraph,

certiorari was granted to consider the remedial powers of the federal district courts in school desegregation cases. This was the sole issue in *Milliken* and it must be viewed and limited as such since it focused only on an appropriate remedy to correct official de jure acts of *racial* discrimination which the petitioners did not challenge. The case was decided on "unique circumstances" and quite properly decided the issue only on specific racial discrimination grounds that resulted from a segregated school system. Respondents submit that the findings of *Milliken* are inapposite to the case *sub judice*.

In summary, can the acts of the United States Congress and the legislature of the State of Mississippi approximately one hundred and thirty (130) years ago (which were taken prior to the adoption of the Fourteenth Amendment in 1868), which were valid in all respects then (and are today) be imputed to elected and appointed public offices in Mississippi today who are charged with no duties concerning the administration of any funds in regard to the Chickasaw Lieu Land Fund under Article VIII, § 212 of the Mississippi Constitution of 1890? Respondents submit the answer to be a resounding "no". Certainly in each of the above cited cases, at least the individuals named in their official capacity were charged by law and actually performed a duty they were sued over and even then relief in the form of compensation was not permitted. In the matter *sub judice* such should also not be permitted.

IV.

There Is No Case or Controversy Under Article III of the United States Constitution

The issue of whether there is a case or controversy existing to satisfy the requirements of Article III of the

United States Constitution in order to maintain this action would also be a sufficient ground upon which dismissal of the complaint would lie. Of course, a plaintiff must allege *personal* injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *Allen v. Wright*, 468 U.S. ....., 82 L.Ed.2d 556, 105 S.Ct. 51 (1985) and *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 70 L.Ed.2d 700, 102 S.Ct. 752 (1982). There is no logical nexus between the acts complained of by the petitioners and the respondents. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 48 L.Ed.2d 450, 96 S.Ct. 1917 (1976). In the instant matter, there is no injury even alleged by the Superintendents and/or School Board petitioners and the parents and the school children's alleged injury is too abstract (failure to receive a minimally adequate education or a reasonable opportunity therefor); the line of causation between the alleged conduct and the alleged injury and the individual official state defendants is too attenuated and the prospect of obtaining relief from the named state defendants in their official capacities as a result of a favorable ruling is too speculative. *Allen* and *Valley Forge, supra.*

The sole injury alleged to have been sustained by the petitioners by virtue of acts in the early to middle 1800's is that they are denied the right and interest in a minimally adequate level of education or a reasonable opportunity therefor.[30] The injury now is that they are

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30. The public perception and comments by at least one named plaintiff and a representative of another dispel this allegation. The Bramlet Elementary School in Oxford, Mississippi, which is a part of the Oxford Municipal Separate School District (Listing of Parties at vi and vii) and the Horn Lake Elementary School which is a part of the DeSoto County District (Listing

(Continued on following page)

not receiving as much money as they desire. Of course, this is saying that if enough money is spent, a minimally adequate education will be received. This theory has been disproved in numerous instances in all types of situations whether dealing with schools, foreign aid, war, etc. because the expenditure of funds simply does not guarantee success. The amount of funds spent has never guaranteed the success of any endeavor much less that of a minimally adequate education. *San Antonio School District, supra,* 411 U.S. at 23-24 and 41-42, 36 L.Ed.2d 16 at 37 and 48, 49, 93 S.Ct. 1278 (1973).

In a most recent case, this Court found in *Valley Forge Christian College v. Americans United for Separation of Church and State, supra,* 454 U.S. at 471, 70 L.Ed. 2d at 708 as follows:

> Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies". The constitutional power of the federal courts cannot be defined and indeed has no substance without reference to the necessity "to adju-

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Footnote continued—

of Parties at iv) have each been nominated to the United States Department of Education for participation in its Elementary School Recognition Program. They are two of seven schools nominated from the entire State of Mississippi which has 154 school districts. In response to the nomination of the Horn Lake School, DeSoto County School Superintendent, Albert Broadway (a named plaintiff), responded:

> "I just think they have an outstanding program. I think the organization is tops and the achievement level is excellent."

Dr. Carole Dye of the Bramlet School responded that her school offered French classes and stays abreast of research into teaching. She further stated that 95 per cent of the pupils score their grade level or higher on achievement tests. "We give it all we got. We intend for the children to do well", Dr. Dye said. Source: *Memphis Commercial-Appeal,* February 11, 1986, p. B2.

> dicate the legal rights of litigants in actual controversies" *Liverpool Steamship Co. v. Commissioners of Immigration,* 113 U.S. 33, 39, 28 L.Ed. 899, 5 S.Ct. 352 (1885). The requirements of Article III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with the courts of law in terms that have a familiar ring to those trained in the legal process.

Respondents submit that this is what the petitioners have attempted to do in the instant matter. The Court in *Valley Forge, supra,* further stated at 454 U.S. 472, 70 L.Ed.2d 709:

> . . . at an irreducable minimum, Art. III requires that a party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant'. *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision'. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38, 41 (1976) [Footnote omitted].

The Court also found in *Valley Forge, supra,* 454 U.S. at 474-475, 70 L.Ed.2d at 711, citing *Worth v. Seldin.*

> In addition, even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Article III, the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to generalized grievances pervasively

shared and most appropriately addressed in the representative branches. [Citation omitted].

Therefore, the only injury alleged by petitioners is so abstract that no claim or controversy can possibly exist under Article III which would give these petitioners standing to bring this action even assuming, which state defendants do not admit, proper jurisdiction. As the Court stated in *San Antonio, supra*:

> "The argument here is not that the children in districts having relatively low assessable property value are receiving no public education; rather it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it.[56] A sufficient answer to appellees' argument is that where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor, indeed, in the view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense.
>
> *San Antonio, supra,* 411 U.S. at 23-24. [Footnote omitted].

If the words "no Sixteenth Section and Lieu Lands" are substituted for "relatively low assessable property values" and "Sixteenth Section and Lieu Lands" for "more assessable wealth" in the above quote, it would speak precisely to the petitioners' allegations in the matter *sub judice*. Further, the abstract questions presented by the Complaint herein are certainly limited to "generalized grievances more appropriately addressed by the representative branches" of the Mississippi Legislature which has done so by enacting 1985 Laws 27, Ch. XXIII. (J.A. 97-98). Petitioners have alleged that the same exact injury has been and will continue to be suffered by each and every petitioner in whatever school district, whether municipal or county, which are, pursuant to the face of the Complaint, located in separate and distinct counties with multi-faceted differences. As the Court stated in *Valley Forge, supra,* at 70 L.Ed.2d 709-710, Art. 3:

> The requirement of actual injury . . . tends to assure that the legal questions presented to the Court will be resolved not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to the realistic appreciation of the consequences of the judicial action.
>
> * * *
>
> Were the federal courts merely publicly funded forms for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of 'standing' would be quite unnecessary. But the 'cases and controversies' language of Article III forecloses the conversion of courts of the United States into judicial versions of college debating forums.

To say that each petitioner in the instant case can allege the exact same injury and could prove same on behalf of each of the other petitioners borders on the incredible. See Footnote 30, *supra*.

The concrete adverseness which sharpens the presentation of issues is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury

itself. *Baker v. Carr,* 269 U.S. 186, 204, 7 L.Ed.2d 663, 678, 82 S.Ct. 691 (1962). *Valley Forge, supra,* at 718.

No charge has been made here that because of any alleged acts regarding the Chickasaw Cession Lieu Lands or the funds derived from the sale thereof that these acts should be subject to strict scrutiny. That is because such an allegation could not be made in good faith. The only contention is that the school children do not receive a minimally adequate education and this is unsupported by any contention that the children do not learn "the three R's" because of any alleged actions regarding the Chickasaw Cession Lieu Lands. Nor is there any allegation or contention that due to said alleged acts the children of the respective districts are thereby deprived of some explicit protection under the Federal Constitution or of an implicitly protected right. To the extent that the acts of the Mississippi Legislature and the people of the State of Mississippi by adopting Section 212 of the Constitution of this state have resulted in unequal expenditures between different school districts both within and without the Chickasaw Cession, it cannot be said that the system is irrational and invidiously discriminatory. To the contrary, the state legislature has as late as 1985 attempted to make the funding equitable to all school districts as previously shown.[31] *cf. San Antonio School District, supra,* U.S. at 410-411, L.Ed.2d at 55.

To summarize, as this Court has so aptly found in *Holt Civic Club v. Tuscaloosa,* 439 U.S. 60, 70-71, 58 L.Ed.2d 292, 302, 99 S.Ct. 338 (1978):

" 'The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its

31. § 37-19-1, *et seq.* of the Miss. Code of 1972, as amended (1985) and 1985 Miss. Laws 27, Ch. XXIII.

application to a particular geographical or political subdivision of a state. *Fort Smith Light Co. v. Paving Dist.,* 274 U.S. 387, 391, 71 L.Ed. 1112, 47 S.Ct. 595 (1927). Rather, the Equal Protection Clause is offended only if the statute's classification "rests on grounds wholly irrelevant to the achievement of the states' objective." *McGowan v. Maryland,* 366 U.S. 420, 425, 6 L.Ed.2d 393, 81 S.Ct. 1101, 17 Ohio Ops. 2d 151 (1961), *Katch v. Board of River Part Pilots Comm'rs.,* 330 U.S. 552, 556, 91 L.Ed. 1093, 67 S.Ct. 910 (1947).' "

Certainly in the matter *sub judice,* the State of Mississippi has acted in a relevant manner in regard to the Chickasaw Cession Lieu Lands and the funds derived from the sale thereof. It has continued to pay interest on the corpus of the trust although it was lost as a result of the Civil War. Certainly it could sell the lieu lands and even Congress acted to approve this. Certainly it can pass an act increasing the amount paid to the respective school districts in the Chickasaw Cession counties as it did in 1985. The state has attempted to provide funds to those districts through legislature enactments and constitutional provisions. The fact that these funds are not in such amounts as petitioners desire is irrelevant. What is in issue here is a direct attack on the way the State of Mississippi has chosen to raise and disburse the funds to the respective districts in the Chickasaw Cession Counties. The Court should not interfere in the complex problem of financing and managing a statewide public school system and the Mississippi Legislature's efforts to tackle the problem should be entitled to respect. *San Antonio, supra,* 411 U.S. at 42, 36 L.Ed.2d at 48. As this court has said:

> The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various states and we do no violence to the values of federalism and separation of powers by staying our hand.

Id., at 58, 36 L.Ed.2d at 57, 93 S.Ct. 1278.

The mere fact that the Constitution of the State of Mississippi has not been changed to adjust the legislative appropriation under Section 212 to keep pace with rising inflation is not a violation of the Equal Protection Clause of the Fourteenth Amendment. *Papasan, et al. v. United States,* 756 F.2d 1087 (1985).

It is a truism of constitutional law that the Equal Protection Clause, despite its name, does not require that all citizens be treated in a precisely equivalent manner under all circumstances. Unequal treatment is justified when it passes muster under judicially enunciated tests, and generally one of two such standards is employed.

Because the "unequal" government action challenged here by petitioners neither impinges upon fundamental rights nor affects members of suspect classes, the most damaging of the tests, strict scrutiny, is inappropriate. See: *San Antonio School District v. Rodriguez,* 411 U.S. 1, 36 L.Ed.2d 16, 93 S.Ct. 1278 (1973). *cf. Zablocki v. Redhail,* 434 U.S. 374, 54 L.Ed.2d 618, 98 S.Ct. 673 (1978). Instead the proper test to be applied is the less rigorous rational-connection test as supplied by the Fifth Circuit. *Papasan,* at 1095. *See: Califano v. Aznavorian,* 439 U.S. 170, 58 L.Ed.2d 435, 99 S.Ct. 471 (1978). Petitioners concede the propriety of rational connection as the constitutional measure of this case but stress that the Court should

adopt some "intermediate review standard." Brief of petitioners at pp. 40-48.

Under the rational-connection test, the challenged "unequal" treatment is justified if intended to further a legitimate state interest to which it is rationally related. The means chosen to further the state interest need not be the only means nor the best. See, e.g., *New York City Transit Authority v. Beazer,* 440 U.S. 568, 59 L.Ed.2d 587, 99 S.Ct. 1355 (1979); *Washington v. Yakima Indian Nation,* 439 U.S. 463, 58 L.Ed.2d 740, 98 S.Ct. 3120 (1979). Where the "unequal" treatment is the product of legislation, as is the case here, a strong presumption of validity attends the challenged legislation. *Califano v. Aznavorian, supra, Noland v. Ramsey,* 597 F.2d 577 (5 Cir. 1979). Finally, legislation challenged under the equal protection clause is valid if rationally related to any legitimate state interest, even if the state interest is never precisely enunciated by the legislature. *New Orleans v. Dukes,* 427 U.S. 297, 49 L.Ed.2d 511, 96 S.Ct. 2513 (1976).

Given the presentation of statutory validity, the petitioners' burden is to "convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true." *Vance v. Bradley,* 440 U.S. 93, 111, 59 L.Ed.2d 171, 99 S.Ct. 939 (1979).

Petitioners' brief relies heavily upon statistical data and develops such information very well. However, *Petitioners' brief in no manner meets the required burden of proof.* To the contrary, Petitioners' brief throughout demonstrates that reasons for the distinction between Chickasaw Cession and Choctaw Cession School Districts did exist and there is no way they could not *reasonably be conceived to be true. Vance v. Bradley, supra.*

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit should be affirmed on the basis of the opinion of said Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. Lloyd Arnold, a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Brief for the Respondents to the following counsel:

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